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In the Supreme Court of the United States

October Term, 1975

No. 75-406

KURT J. WUNNICKE, and EDWARD J. PIETERS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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September, 1975

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KURT J. WUNNICKE, and EDWARD J. PIETERS,

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioners, Kurt J. Wunnicke and Edward J. Pieters, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on June 5, 1975.

OPINION BELOW

The opinion of the Court of Appeals, which has not been selected for publication, appears in the Appendix hereto. No opinion was rendered by the District Court for the District of Colorado.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on June 5, 1975. A timely petition for rehearing was denied on August 21, 1975, and this petition for writ of certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Where a trial court, in ruling on the validity of a search warrant, is presented with evidence that requires the probing of the information given by an informant to an affiant officer, and the court determines that an *in camera* hearing should be held, should the informant be produced for cross-examination when his testimony is crucial to the determination, and should counsel be afforded an opportunity to participate in the hearing?

2. Should stops for investigation of moving vehicles be based upon reasonable, articulable grounds, and if so, did the circumstances here, which did not involve any violation of traffic laws and did not present any emergency situation, justify the intrusion into Petitioners' right to privacy?

3. Assuming that the investigatory stop was illegal, did the Court of Appeals improperly determine that the mere giving of "Miranda warnings" removed any taint of the illegal arrest, thus rendering the statement given by one of the petitioners voluntary?

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendment IV provides:

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall

issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

U.S. Constitution, Amendment V, provides in pertinent part:

"No person shall * * * be deprived of life, liberty, or property without due process of law; * * *."

U.S. Constitution, Amendment VI provides in pertinent part:

"In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him; * * * and to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

Petitioners were charged in a two-count indictment filed in the District Court for the District of Colorado with having possessed with intent to distribute, and with having manufactured 3, 4-methylenedioxy amphetamine (MDA) in violation of 21 U.S.C. §841(a)(1) and 18 U.S.C. §2. Following a jury trial, Petitioners were found guilty. Petitioners Pieters was subsequently sentenced to a term of up to six years' imprisonment under the Youth Corrections Act, and Petitioner Wunnicke was committed for a term of four years. Upon direct appeal pursuant to 28 U.S.C. §1291, the Court of Appeals for the Tenth Circuit affirmed the judgment of the District Court.

Prior to the trial below, Petitioners filed several motions to suppress evidence. The denial of these motions formed the basis for Petitioners' arguments in the Court of Appeals and are the subject of this petition.

On the morning of January 17, 1974, Petitioners were riding in Petitioner Pieters' vehicle on I-25 on their way from Boulder to Denver, Colorado. At the same time, two agents assigned to the Drug Enforcement Administration (DEA) were

in their vehicle on the same road. Agent Van Ark recognized Petitioners' vehicle as one owned by Pieters. The two agents did not suspect that Petitioners had violated any traffic laws, nor did they have probable cause to arrest them for any other alleged violations. Nonetheless, the agents effected a stop of Petitioners' moving vehicle by pulling their own automobile alongside Petitioners', exhibiting their badges and indicating that they wished Petitioners to pull over to the side of the road. Petitioner Pieters immediately complied with this request. According to their testimony at the suppression hearing, the agents had stopped Petitioners solely to determine their current addresses. Petitioners had, according to agent Van Ark's testimony, been the subject of an investigation for several months concerning the possible distribution or manufacture of MDA. Van Ark had lost contact with Petitioners in September, 1973, but he relocated Petitioner Pieters at the latter's house in Boulder in October, 1973. This house was owned by Petitioner Pieters, and the telephone number was listed. Van Ark had very sporadically surveilled this house, but he was unable to locate Petitioner Wunnicke. Van Ark also testified that he had received information from an informant that Petitioners were engaged in the distribution, if not the manufacture, of MDA. Van Ark conceded, however, that he did not have probable cause on January 17th to arrest either of the Petitioners; he only wanted to get their addresses, so he stopped their moving vehicle.

After accomplishing the stop of the vehicle, the agents had Petitioners alight from the vehicle and show them identification. Following this, as the agents were beginning to look in the vehicle, Petitioner Pieters told them, "Before you find it, I have a gun." At the request of the agents, Pieters produced a briefcase and opened it, revealing a revolver. There was also a vial of pills in the case. These pills later turned out to be caffeine, a substance whose possession is not illegal under either federal or state law. Petitioners were placed under arrest, apparently for carrying a concealed weapon and possession of a dangerous drug (state offenses). Despite this, they were taken to DEA headquarters in Denver, where they remained for several hours and where the arresting and other agents attempted to question them. They then were

transported to Denver City Jail, some four hours after their original contact with the DEA agents.

During the period in which Petitioners were in the City Jail, a Denver Police officer obtained a warrant to search the Petitioners' business premises. This warrant was based upon an informant's having seen, on the previous day, L.S.D. and chemical apparatus on the premises. A search pursuant to the warrant occurred while Petitioners were in the City Jail, and a laboratory for the manufacture of MDA was discovered. Following execution of the search warrant, a DEA agent went to the City Jail and informed Petitioners that they now would be held on federal charges. After an advisement of his rights, Petitioner Wunnicke gave an incriminatory statement to the effect that he had previously been engaged in the manufacture of MDA at the laboratory that had been searched. Despite the fact that Petitioner Wunnicke had been given the so-called "*Miranda* warnings," he had not been afforded the opportunity to contact an attorney. In addition, Pieters had signed a statement to the effect that Wunnicke knew nothing of the gun or the pills, so there was no justification for holding Wunnicke shortly after his arrival at the Denver City Jail.

The Court of Appeals found that the investigative stop of Petitioners' vehicle was proper, appendix at p. A-3 - A-4 and that no improper action on the part of the agents had produced Wunnicke's statement. Appendix at p. A-5.

At the hearing on the motion to suppress, Petitioners challenged the truthfulness of the affidavit upon which the search warrant was based. They alleged that no one but themselves had been in the laboratory on January 16th, the day when the alleged informant saw the "L.S.D.," and they buttressed these allegations by presenting polygraph tests which confirmed that they were telling the truth. The trial court accepted the polygraph results as evidence for purposes of the hearing, and it admitted that it was troubled by this presentation. (Record on Appeal, vol. IV, p. 209-212.) Trial counsel for Petitioners urged that the alleged informant be produced and that they be given an opportunity to examine him. Instead, the trial court held an *in camera* hearing,

without the presence of counsel or the informant. The only witness was the affiant, the Denver Police officer. The trial court questioned the affiant about the existence of the informant, and the court had the clerk conduct an investigation with the state court to verify certain of the information given by the affiant officer. This hearing and information was sealed and never revealed to Petitioners or their counsel. Despite an argument that both counsel and the informant, or at the very least the informant should have been examined *in camera*, the Court of Appeals found that the procedure employed by the trial court was proper and adequate. Appendix at p. A-4 - A-5.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE PROPER CONDUCT OF AN IN CAMERA HEARING, AND IT RAISES IMPORTANT QUESTIONS FOR THE ADMINISTRATION OF JUSTICE.

Petitioners asserted below that the informant who allegedly gave the information upon which the search was based did not in fact exist. They buttressed this assertion by introducing the results of polygraph examinations which supported their statements that no one but them had been in the building in question on January 16, 1974, the date of the informant's alleged visit, and that they had talked to no one concerning an MDA laboratory. While they sought the disclosure of the informant, trial counsel stated a willingness to submit to an *in camera* hearing at which Petitioners would not be present, but during which they could cross-examine the alleged informant. They further stated that they were willing to be bound by a trial court order not to discuss the results of the *in camera* hearing with Petitioners. Despite this offer (and suggestion), the trial court merely examined the affiant and never ordered the production of the alleged informant, *in camera* or elsewhere. In fact, it might have been impossible to produce the alleged informant, for the affiant could not locate him. (Record on Appeal, vol. VI, p. 235.)

This decision of the trial court, which was approved by the Court of Appeals as a proper exercise of the court's discretion, raises grave issues about the proper administration of justice in the federal trial courts.

In *Roviaro v. United States*, 353 U.S. 53 (1957), this Court recognized a qualified privilege against disclosing an informant. However, this Court also said:

> "Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is *essential to a fair determination of a cause*, the privilege must give way." *Id.* at 60-61. (emphasis added)

Several Courts of Appeals have addressed the problem presented by the instant case and have devised ways of handling the disclosure problem while at the same time affording the defendant his rights to due process, confrontation and assistance of counsel. In *United States v. Hurse*, 453 F.2d 128 (CA 8 1972), the validity, as here, of a search rested upon what information, if any, a supposed informant had given the searching officers. The court there held that "[i]n this situation it is therefore essential both to a fair trial and to the integrity of the verdict that the court satisfy itself that the police did have probable cause for the initial entry and arrest." *Id.* at 131. It therefore remanded for an *in camera* examination by the trial court of the informant and directed the court to "satisfy itself on the issue of probable cause for the initial entry." *Id.*[1]

Similarly, other courts have recognized that, at the very least, the informant himself must be examined. *United States v. Jackson*, 384 F.2d 825 (CA 3 1967) cert. denied 392 U.S. 932; *United States v. Untiedt*, 493 F.2d 1056, 1060 (CA 8 1974), cert. denied 419 U.S. 862; *United States v. Rawlinson*,

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[1] On remand, the examination was without the presence of counsel. *United States v. Hurse*, 477 F.2d 31, 33 (CA 8 1973), cert. denied 414 U.S. 908.

487 F.2d 5 (CA 9 1973), cert. denied 415 U.S. 984; *McLawhorn v. North Carolina*, 484 F.2d 1, 5 n. 12 (CA 4 1973); *United States v. Gocke*, 507 F.2d 820, 826 n. 7 (CA 8 1974).

Other courts have recognized the advisability of having counsel as well present at the *in camera* hearing. See *United States v. Barnes*, 486 F.2d 776, 780-781 (CA 8 1973); *United States v. Kitchen*, 488 F.2d 572 (CA 8 1973); *Little v. United States*, 490 F.2d 686 (CA 8 1974). In *United States v. Anderson*, 509 F.2d 724 (CA 9 1975), cert. denied 420 U.S. 910, apparently the only other decision in which neither the informant nor counsel were present, the court suggested that the better practice would be to have defense counsel present at the *in camera* hearing and that counsel should be afforded an opportunity to cross-examine the *in camera* witnesses. *Id.* at 724.[2] Counsel could also properly be required not to reveal the results of the hearing to anyone,

[2]The Ninth Circuit held that the decision over the manner in which an *in camera* hearing might be conducted was within the trial court's discretion. *Id.* at 730. With due respect for the abilities of trial courts, it is submitted that entrusting the decision to the trial judge as to what witnesses will be examined *in camera* simply does not insure the defendant's rights, nor does it insure that judicial integrity will be maintained. As this Court has recognized in *Dennis v. United States*, *infra*; and *Alderman v. United States*, *infra*; and as the court noted in *United States v. Rawlinson*, *supra*, a trial judge is not in the same position as an advocate to determine what is or is not relevant, what questions should be asked and areas should be probed, or what witnesses would prove to be "relevant" to the defense. The propriety of holding an *in camera* hearing is not questioned, but what is crucial to the amplification of truth is the issue of who will be witnesses, and who will conduct the examination. Leaving this to the discretion of the trial court would result in the affirmance of the decision and procedure below, where the informant did not testify and counsel was not present. And yet the Eighth Circuit has recognized, in *United States v. Hurse*, *supra*, that when the probable cause for a search rests

including the defendant. The advantage of the presence of counsel would, of course, be to enhance the search for truth. As Judge Hastie, dissenting in *United States v. Rawlinson, supra*, noted:

> "The majority opinion recognizes that this questioning [of the informant] was conducted in the presence of a police officer, 'was not conducted as vigorously as it might have been' and did not include questions timely filed by defense counsel for the judge's use. I cannot be confident that such questioning provided an adequate substitute for searching pre-trial examination of the informer by defense counsel * * *." 487 F.2d at 8.

This Court has also recognized that there can be no substitute for counsel in similar situations. In *Dennis v. United States*, 384 U.S. 855 (1966), this Court rejected the use of *in camera* inspections of grand jury minutes and held that once a preliminary showing of need was shown, the trial court ought not attempt to determine the usefulness of the information:

> "In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an

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[2](Cont'd)
upon the validity of what information, if any, was given by an alleged informant, it is absolutely necessary to cross-examine the informant. In the instant case the validity of the search depends entirely upon the validity of the information given by the "informant," and yet the trial court did not order the informant to be produced. At the same time, the trial court acknowledged that the presentation of the polygraph evidence raised a question as to whether an informant did exist. If the decision under these circumstances as to the production of an informant for *in camera* examination is left to the discretion of the trial court, it is obvious that the integrity of verdicts will not be maintained, for here the trial court clearly did abuse its discretion, and yet its decision was affirmed on appeal.

advocate. The trial judge's function in this respect is limited to deciding whether a case has been made for production, * * *." *Id.* at 874-875.

Similarly, in *Alderman v. United States*, 394 U.S. 165 (1969), this Court rejected an *in camera* screening by the trial judge of the fruits of electronic eavesdropping to determine whether it had any "arguable relevance" to the defense. *Id.* at 184. And in the context of trial, this Court has subordinated considerations of a witness' personal privacy to those of truth-finding by means of effective, wide-ranging cross-examination. *Davis v. Alaska*, 415 U.S. 308 (1974).

It is therefore submitted that in order to facilitate the search for truth and to afford defendants in similar situations their rights to counsel and confrontation, this Court should adopt a standard requiring, at the very least, the presence of the informant for examination *in camera* by the trial court in situations as here, where the "fair determination of a cause" hinges on what, if anything, the informant told the officers.[3] To examine only the affiant, as here, merely compounds the original problem. If the affiant was fabricating in the first place about the existence of the informant, it would be equally possible for him to repeat these fabrications *in camera* and to substitute other cases, in which a real informant was involved, for the information he allegedly received from the informant in question. If the affiant was instead negligent in determining how the informant got his information (such as by an illegal break-in, as asserted below), then an examination of the affiant will not substitute for a searching examination of the informant himself. Secondly, the presence of counsel, who is more familiar with the peculiar issues present in each

[3] There was no doubt below of the propriety of delving below the four corners of the affidavit in the situation presented here. Appendix at p. A-5; *United States v. Harwood*, 470 F.2d 322 (CA 10 1972); *United States v. Belculfine*, 508 F.2d 58 (CA 1 1974); *United States v. Marihart*, 492 F.2d 897 (CA 8 1974); *United States v. Carmichael*, 489 F.2d 983 (CA 7 1973) (en banc); *United States v. Thomas*, 489 F.2d 664 (CA 5 1973).

case, would facilitate the accuracy of the fact-finding process. Because of the importance of this question to the administration of justice, and because of the likelihood of this problem recurring in other cases, this Court should grant the writ to review the judgment below.

2. THE DECISION BELOW RAISES IMPORTANT QUESTIONS CONCERNING WHAT STANDARDS ARE TO BE REQUIRED FOR THE INVESTIGATORY STOP OF A MOVING VEHICLE.

It is important to recognize what the stop of Petitioners' moving vehicle on January 17, 1974, involved and what was not involved. It was *not* a stop for a traffic offense, not a stop for a safety inspection, nor a routine roadblock check for drivers' licenses. The DEA agents had no basis for suspecting that a crime was being committed at that particular time and place. Furthermore, rather than the investigatory "seizure," there were other alternatives available. The agents could have established surveillance of Pieters' house, and they could have surveilled Petitioners' business address, (where the lab was ultimately found) which address they had known for several weeks. A driver of a motor vehicle, in the ordinary nature of events, does not expect to be stopped and directed to pull off the road when no offense has been committed and no roadblock has been set up. In this sense the driving of a motor vehicle is not a strictly regulated business, and therefore is not subject to the decisions of this Court in *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970); and *United States v. Biswell*, 406 U.S. 311 (1972); see *Almeida-Sanchez v. United States*, 413 U.S. 269, at 270-272 (1973).

Despite these factors, the Court of Appeals upheld the investigatory stop of Petitioners' moving vehicle. The court below relied on its decision in *United States v. Self*, 410 F.2d 984 (CA 10 1969), which recognized that an officer engaged in a routine police investigation may detain a person briefly on less than probable cause. The court also relied on a Colorado statute, C.R.S. 1963, 13-4-13, which the court interpreted as giving police officers the right to stop cars and

ask for the production of driver's licenses without any showing of cause.[4] Appendix at A-3. It is submitted that the decision below has created an improper standard for the stopping of moving vehicles and is in conflict with the standards established by other circuits.

In *United States v. Ward*, 488 F.2d 162, 167 (CA 9 1973) (en banc), the court rejected a stop under circumstances virtually the same as in the instant case. There the defendant was in a moving vehicle and was stopped for investigation despite other alternatives open to the F.B.I. agents. The agents knew where the defendant lived and worked, they knew his car and knew that the defendant had been using a fictitious name and had fictitious identification. The court held that the seizure of the defendant for purposes of investigation lacked founded suspicion. No criminal activity was afoot; the defendant was stopped pursuant to a general criminal investigation of several months' duration. There was no emergency situation at hand, and the agents had never attempted to interview the defendant at either his home or place of work. The agents had no basis for suspecting that

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[4] Both grounds for the decision below would appear to be erroneous. The Colorado statute has been interpreted by the Colorado Supreme Court to require an articulable suspicion or probable cause before a moving vehicle can be stopped. *Martinez v. People*, 169 Colo. 366, 456 P.2d 275 (1969). Furthermore, the state statute clearly cannot give authority to stop without reasonable grounds, for the legislative enactment cannot "authorize a violation of the Constitution." *Almeida-Sanchez v. United States*, *supra*, at 272.

Furthermore, its own decisions do not support the Court of Appeals. *United States v. Self*, *supra*, involved a car that had already been parked by the occupants, and suspicious behavior *at the time* was apparent. *Stone v. Patterson*, 468 F.2d 558 (CA 10 1972), also cited below, likewise did not involve the stopping of a moving vehicle. The defendant there was not approached until after he had exited the car and was crossing the street, and reasonable suspicion was present because of recent false information that the defendant had given.

defendant had violated any criminal laws at the time, and the agents were seeking information concerning another individual, not the defendant. *Id.* at 169. The court therefore held that the requirements of this Court's decisions in *Terry v. Ohio*, 392 U.S. 1 (1968) and *Adams v. Williams*, 407 U.S. 143 (1972) had not been met, for there was no demonstration of reasonable grounds for the seizure and intrusion.

Similarly, the Court of Appeals for the Eighth Circuit has held that such an investigatory stop must be based upon specific facts which would reasonably warrant the intrusion. *United States v. Nicholas*, 448 F.2d 622 (CA 8 1971).[5]

In contrast, the decision below has reduced the requirements of the Fourth Amendment to a hollow showing by police that they were engaged in a "routine police investigation." This leaves the decision to stop and question to the "unreviewed discretion of the enforcement officer in the field," which this Court has previously condemned in *Camara v. Municipal Court*, 387 U.S. 523, 532-533 (1967). The decision below also appears to be in conflict with the principles announced last Term by this Court in *United States v. Brignoni-Ponce*, 422 U.S. ____ , 95 S. Ct. 2574 (1975). In that case this Court addressed the issue that had been reserved in *Terry v. Ohio*, *supra*, the propriety of an "investigative seizure" upon less than probable cause for purposes of interrogation. This Court held that such stops and inquiry could occur, provided that the type of founded suspicion that was articulated in *Terry* was also present in the circumstances. 422 U.S. at ____ , 95 S. Ct. at 2581. While the decision in *Brignoni-Ponce* dealt specifically with roving stops by Border Patrol agents, and while this Court did not express an opinion as to the power of state agencies to enforce motor vehicle laws, 422 U.S. at ____ and n. 8, 95 S. Ct. at 2580-2581, it is submitted that the principles articulated in that case are

[5] In accord with these requirements for the investigatory stop of a pedestrian are such cases as *Au Yi Lau v. I.N.S.*, 445 F.2d 217, 223 (CA DC 1971), cert. denied 404 U.S. 864 (1971), and the Tenth Circuit's own decision in *Stone v. Patterson*, *supra*.

equally applicable here, where the stop of Petitioners' vehicle did not occur because of any alleged violation of traffic laws. Rather, the stop and seizure of Petitioners was for purposes of interrogation. The interests of Petitioners here were identical to those of the respondents in *Brignoni-Ponce*. Among these were the interest in freedom from arbitrary governmental influence; in freedom of movement; in the freedom to avoid those persons that Petitioners did not want to encounter; in privacy rights (as to what was located in the car; the interest here, in a moving vehicle, is much more pronounced than in the case of a parked vehicle or a pedestrian); and the freedom to position one's self. *See* Note, Nonarrest Automobile stops: Unconstitutional Seizures of the Person, 25 Stan. L. Rev. 865 (1973).

Since these interests of Petitioners were not outweighed by the interest of the Government in determining a residence address,[6] and since the standardless decision below leaves the protections of the Fourth Amendment to the discretion of the agent in the field, this Court should grant the writ to review the decision below.

3. THE DECISION BELOW HAS RAISED A SEEMING CONFLICT WITH DECISIONS OF THIS COURT.

The stop and subsequent arrest of Petitioners led to some nine hours of shuttling between federal and state authorities. During this time there was no reason to hold Petitioner Wunnicke, for Pieters had signed a statement absolving Wunnicke of any knowledge of the former's possession of the gun and caffeine pills. If the stop was improper, then two highly damaging events resulted from the incarceration. If there was in fact no informer, then the

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[6] Certainly much less restrictive alternatives were available to the DEA agents. They could have "staked out" Pieters' home, which address they knew, or they could simply have surveilled Petitioners and attempted to locate Wunnicke's address by following him.

search of the lab probably resulted from the DEA agents' discovery of an envelope in Petitioners' car. This envelope revealed the address of the lab. Petitioner Wunnicke also made a highly incriminating statement approximately nine hours after his arrest. Absent this statement, the Petitioners could not have been connected to the laboratory. The Court of Appeals found that this statement was not the product of any impropriety on the part of law enforcement officials, apparently because Wunnicke had been advised of his rights. Appendix at p. A-5. In so holding, the decision below would appear to be in conflict with this Court's decisions in *Wong Sun v. United States*, 371 U.S. 471 (1963) and *Brown v. Illinois*, 422 U.S. ____ , 95 S.Ct. 2254 (1975).

In the latter case, this Court rejected the Illinois courts' *per se* rule that the giving of *Miranda* warnings would cure any taint of the illegal arrest which had occurred. This Court held that even if the statements were found to be voluntary in the Fifth Amendment sense, there still remained the Fourth Amendment issue. 422 U.S. at ____ , 95 S.Ct. at 2260-2261. This Court therefore held that "the question whether a confession is the product of a free will under *Wong Sun* [i.e., in the Fourth Amendment sense] must be answered on the facts of each case." *Id.* at ____ , 95 S.Ct. at 2261.

The decision below held that the arrest of Petitioners was legal, and therefore it did not reach the *Wong Sun* issue, *supra*. Assuming that the question raised by Petitioners concerning the validity of the investigative stop is resolved in their favor, then the question of the admissibility of Petitioner Wunnicke's statement under *Wong Sun*, *supra*, and *Brown v. Illinois*, *supra*, must be reached. Because this was not done by the court below, this Court should grant the writ to review the decision below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

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September, 1975

APPENDIX A

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

Nos. 74-1454-55

UNITED STATES OF AMERICA, *Appellee*,	)	Appeal From The
v.	)	United States
KURT J. WUNNICKE and EDWARD J. PIETERS, *Appellants.*	)	District Court For The District of Colorado (D.C. #74-CR-67)

Filed June 5, 1975

Bryan Morgan, of Sherman, Sherman & Morgan, Denver, Colorado, for Appellant Wunnicke.

Robert Bruce Miller, of Miller and Gray, P.C., Boulder, Colorado, for Appellant Pieters.

Arthur H. Bosworth, Assistant United States Attorney (James L. Treece, United States Attorney, with him on the Brief), for Appellee.

Before HILL, SETH and BARRETT, Circuit Judges.

SETH, Circuit Judge.

The appellants were charged, tried, and found guilty on two counts, one for a violation of 21 U.S.C. §831(a)(1), the possession with intent to distribute an amphetamine, and the second for the manufacture of the amphetamine (MDA).

The issues on appeal concern the refusal of the trial court to suppress evidence which was obtained during the search of a building in Denver made pursuant to a search warrant. The attack centers on the basis for the warrant, and the refusal by the trial court to order the production of the informer referred to in the warrant. An extensive hearing prior to trial was held on the appellants' motion to suppress.

The record shows that two Boulder County Sheriff's detectives attached to the Drug Enforcement Administration had been investigating the activities of the defendants for a considerable time; knew them by sight, and knew the van which defendant Pieters ordinarily drove. These officers were driving from Boulder to Denver and en route saw the van of defendant Pieters with Pieters driving and defendant Wunnicke as a passenger. The officers motioned them to stop, which they did, and the officers approached the van on foot. The officers identified themselves; one asked the driver for his driver's license and car registration; the other officer asked the passenger Wunnicke for some identification. Defendant Pieters almost immediately volunteered to the officer talking to him that he had a gun in the car. Pieters then opened a briefcase on the car seat between himself and the passenger to show the gun to the officer. As the briefcase was opened, the officer also saw a vial of pills which he believed to be an amphetamine. Both defendants were then arrested for carrying a concealed weapon and possession of dangerous drugs. They were taken to the Drug Enforcement Administration offices in Denver where they were booked. After several hours they were taken to the Denver Police Department.

The record indicates that during the time the defendants were being booked at both places, a city detective, Mike Martinez, was obtaining a warrant to search a building in Denver at 1220 South Jason. This warrant, on its face, showed it was based on the previous investigations by the detective and upon information as to what an undisclosed

informant had seen in the building searched and had heard the defendants discussing. The warrant was executed about 4:00 p.m. the day defendants were arrested and during the time they were being held at the city jail. The search of the building disclosed a chemical laboratory and quantities of MDA. After this search, in which federal agents had participated, an agent of the DEA went to the defendants at the Denver jail and advised them of the search and that they were being held on federal charges. This agent and others questioned the defendants, and soon thereafter defendant Wunnicke gave an incriminating statement. This statement was used at trial.

As stated above, the issues on appeal center on the search warrant, the basis for its issuance, the refusal by the trial court to order the informant be produced, and the relationship of the warrant to the stopping of defendants' car on the highway.

The act of the officers in stopping the defendants on the highway was not improper. As police officers they had statutory authority in Colorado to stop cars and to ask the drivers to show their licenses (C.R.S. 1963 § 13-4-13). There was also nothing improper in the other officer talking to the passenger at the same time. As indicated, the driver almost at the outset of the conversation volunteered the information that he had a gun. A loaded pistol was then revealed by him and the arrest of both defendants followed. The initial stop was also made, according to the officers' testimony, for the reason that the defendants whom they recognized had been under investigation by them for several months.

It is apparent that the presence of the gun disclosed after the initial stop put a somewhat different complexion on the situation as it thereafter developed, as did the presence of the pills in the same briefcase. The arrest of the defendants was with adequate cause although they were not thereafter convicted on the charges for which they were arrested.

We held in United States v. Self, 410 F.2d 984 (10th Cir.), that an officer during the course of his ordinary investigation may stop and question individuals. We said: "When an officer is engaged in a routine police investigation

he may detain a person briefly in circumstances not justifying an arrest." *See also,* Adams v. Williams, 407 U.S. 143; Stone v. Patterson, 468 F.2d 558 (10th Cir.); United States v. Mallory, 460 F.2d 243 (10th Cir.); Sablowski v. United States, 403 F.2d 347 (10th Cir.); Stone v. People, 485 P.2d 495 (Colo.). The officers here acted reasonably within the doctrine of Terry v. Ohio, 392 U.S. 1, as applied to a situation not considered to be dangerous to the officers.

The defendants also assert that the search warrant was defective. This contention is based upon an assumption that something seized during the course of their arrest was issued or that their arrest precipitated action by the city officer who secured the warrant based upon information he really did not have or attributed to a nonexistent informer. The warrant was secured and executed during the time defendants were in custody following their arrest, sometime between about 9:00 a.m. and 4:00 p.m. of the day of their arrest.

The hearing on the motion to suppress was in some detail with officer Martinez present but not the informer. The Government asserts that none of the items seized during the arrest of defendants were used as a basis for the warrant and the record so indicates. The defendants advanced the possibility that their keys which were removed during booking were used to gain entrance to the building in question before the search warrant was obtained, but the record does not so show. Thus the issue is reduced to the informer aspect of the warrant.

The basic contention of defendants is that the affidavits supporting the warrant were at least inaccurate, and that there may in fact have been no informer at all. The hearing on the motion to suppress covered the several points, and the officer testified as to what facts he knew and what the informer supplied. The defendants had the burden of showing that the affidavit was inaccurate and this they did not do.

The trial court as part of the hearing also questioned the detective *in camera* as to the informer's identity, his previous use by the officer, and particular prosecutions which resulted. These prosoecutions were verified by the judge. The trial court was thus satisfied that the informer did exist. This

method is a suitable one under the circumstances, the hearing was adequate, and the trial court's determination will not be overturned short of a clear abuse of discretion.

This court has considered similar hearings in United States v. Harwood, 470 F.2d 322 (10th Cir.), and in United States v. Rael, 467 F.2d 333 (10th Cir.). Of the *in camera* aspect of the suppression hearing the defendants argue in their brief: "Appellants contend that this disclosure was little more than had already been revealed, and was insufficient to demonstrate that an informant actually existed." The contentions of the defendants are based solely upon speculation, and upon the timing of the issuance of the warrant. No facts otherwise were shown, and the hearing demonstrated that defendants could not carry their burden in the attack on the warrant.

The trial court was further acting within its discretion and the prevailing doctrine in its refusal to require the informer to be produced. McCray v. Illinois, 386 U.S. 300.

As to the delay in charging the defendants on the federal charges, the record shows, as above recited, the interaction of state officers and state charges, and federal officers and federal charges. The whole matter took most of an entire day with the arrests, the trip into Denver, the booking at both places, the warnings, and the rewarning and interrogation by the federal officers on the final charges. The time which elapsed from the search to the advice of federal charges, and interrogation on them, was short. The incriminating statement by defendant Wunnicke followed shortly after he was told of the federal charges. The defendants have demonstrated nothing on this appeal to show that the procedure which was followed was improper. There was a substantial difference in the testimony as to events which transpired while defendants were held, and the court apparently accepted the testimony of the police officers on these points. The defendants had been properly arrested on state charges and were being held at the Denver city jail when the federal officers told them of the search and the charges.

AFFIRMED.

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-406

KURT J. WUNNICKE and EDWARD J. PIETERS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court's oral opinion on the motion to suppress is reproduced in part in the Appendix, *infra*. The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 5, 1975, and a timely petition for rehearing was denied on August 21, 1975. The petition for a

writ of certiorari was filed on September 15, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the informant who gave the information upon which an affidavit for a search warrant was based should have been produced for examination by defense counsel at a suppression hearing.

2. Whether an incriminating statement made by petitioner Wunnicke while being held in custody in a jail should have been suppressed as the fruit of an unlawful stop of a vehicle.

STATEMENT

After a jury trial in the United States District Court for the District of Colorado, petitioners were convicted of manufacturing and possessing with the intent to distribute "3,4-methylenedioxy amphetamine" (MDA), a Schedule I amphetamine,[1] in violation of 21 U.S.C. 841(a)(1). Petitioner Wunnicke was sentenced to four years' imprisonment, subject to the immediate parole eligibility provision of 18 U.S.C. 4208(a)(2), to be followed by a two-year term of special parole; petitioner Pieters was sentenced under 18 U.S.C. 5010(b), the Federal Youth Corrections Act, to a maximum of six years' supervision, including a maximum of four years' impris-

[1] See 21 U.S.C. 812(c), Schedule I(c)(1).

onment, as provided by 18 U.S.C. 5017(c). The court of appeals affirmed (Pet. App. A).

1. The evidence showed that petitioners established and operated a laboratory for the manufacture of MDA, a controlled substance, and that they manufactured and possessed with intent to distribute about 15 pounds of MDA, which has a wholesale value of about $4,000 a pound (Tr. 10-13, 16, 50-58, 104, 155-158, 187-188).[2] The evidence was obtained from two separate investigations, one by Denver police and the other by Boulder County detectives attached to a federal DEA (Drug Enforcement Administration) task force. The two efforts converged on January 17, 1974, when the Denver police were accompanied by members of the task force in the execution of a State warrant to search petitioners' laboratory (Mot. Tr. 62-63, 85-86).

a. In January 1974, two Boulder County detectives attached to the DEA task force were continuing their five-month-long investigation into petitioners' involvement in the manufacture of MDA (Mot. Tr. 12, 14-15, 18, 67). By the 17th of January, both suspects had dropped out of sight: Wunnicke had not been seen since October 1973, and Pieters since December 1973 (Mot. Tr. 18, 19). On the morning of the 17th, while driving to work, the detectives hap-

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[2] "Tr." refers to the trial transcript, which constitutes volumes I and II of the record on appeal; "Mot. Tr." refers to the transcript of the hearings on the motions to suppress, which constitute volumes III to VI of record on appeal. "R." refers to other portions of the record on appeal.

pened upon a vehicle, being driven by Pieters, in which Wunnicke was a passenger in the front seat (Mot. Tr. 12-13, 18-19, 39). The detectives sounded their horn and signaled Pieters to stop the vehicle; they wanted to ascertain Wunnicke's address and to verify Pieters' address (Mot. Tr. 19-20).

While examining Pieters' driver's license and registration card, one of the detectives noticed on the dashboard an envelope on which was printed the name and address of the laboratory. Pieters apparently became nervous at the detective's interest in the envelope and asked whether the detective was "with Federal Narcotics." When the detective replied affirmatively, Pieters said, "[b]efore you find it, I have a gun" (Mot. Tr. 21-22). Pieters opened his brief case, and as the detective retrieved the gun, he saw a bottle containing about 30 white tablets, which looked like methamphetamine, a controlled substance (Mot. Tr. 22-24).[3]

Petitioners were thereupon arrested and taken to the task force office, where they were booked and given *Miranda* warnings (Mot. Tr. 24-29). They were then driven to the Denver police station, where they were formally booked for local firearms and drug charges (Mot. Tr. 29-30). The detectives then went to the laboratory in order to investigate further but there was no one there to admit them (Mot. Tr. 54, 61). Thereafter, one of the detectives attempted to gather sufficient information to support

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[3] The pills turned out to be only caffeine, a substance which is not controlled (Mot. Tr. 44).

a search warrant, but he ceased his efforts when he learned that the Denver police had already obtained a warrant as a result of their own independent investigation (Mot. Tr. 55-57, 62-63).

b. The Denver police investigation had been conducted by Detective Martinez, who learned the address of the laboratory and the identities of petitioners from an informant in January 1974. Detective Martinez had also surveilled the premises of the laboratory himself (Mot. Tr. 86-88). Upon learning of petitioners' arrest, Detective Martinez contacted his informant in an attempt to obtain sufficient information to allow the issuance of a warrant and its execution before petitioners could be released on bail (Mot. Tr. 93-94). The informant told Detective Martinez that he had seen LSD in a bench in the laboratory just the day before (Mot. Tr. 89-90). This information, together with the informant's previous information and the detective's averrment that he had smelled the odor of chemicals and seen containers for chemicals used in the production of unlawful drugs near the premises, provided the basis for a search warrant (see Affidavit for Search Warrant, R. Vol. VII, 46-A).[4]

c. After searching the laboratory and seizing 15 pounds of MDA, a DEA agent visited petitioners at the Denver jail. The agent advised Wunnicke of his constitutional rights, and told him what had

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[4] The court of appeals found that probable cause for the search warrant was unrelated to the arrest of petitioners (Pet. App. A-4).

been found at the laboratory (Mot. Tr. 67-69). Wunnicke then told the agent, "I am glad it is over." He said he had gotten out of the business once, but that he got back into it as his way of rebelling against President Nixon. Wunnicke also implied that he had personally taken part in the process of making the MDA (Tr. 187-188). Wunnicke's statement did not incriminate Pieters.

2. Following the return of the indictment, petitioners moved to suppress the evidence seized pursuant to the search warrant and the statement made by Wunnicke. After an evidentiary hearing, the district court held that the arrest was legal and that Wunnicke's statement was voluntary (Mot. Tr. 212-213). However, because of questions raised by petitioners as to the existence of the informant, the judge determined to examine Detective Martinez *in camera*, without the presence of counsel, in order "to be as sure as we can" (Mot Tr. 208-209, 227-229).

At the *in camera* hearing, the judge learned the identity of the informant, questioned Detective Martinez about the informant, and had the court clerk verify through court records the reliability of the informant (App., *infra*, pp. 1a-2a).[5] Following the *in camera* examination, the court made the following findings (App., *infra*, pp. 2a-4a): that there was an informant, that he had proven reliable on at least two

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[5] The transcript of the *in camera* proceeding and two memoranda regarding the investigation made by the court clerk (Vol. VIII, record on appeal) were sealed.

previous occasions, and that Detective Martinez had a reasonable basis for crediting the informant. Accordingly, the court held that the warrant was supported by probable cause, and denied the motion to suppress the fruits of the search (App., *infra*, pp. 3a-4a).[6]

ARGUMENT

1. Petitioners contend (Pet. 6-11) that the district court should have required the government to produce the informant to be questioned by defense counsel at the suppression hearing.

The decision whether the government should be required to produce an informant for examination by a defendant at a suppression hearing is to be made on a case-by-case basis and rests in the sound discretion of the trial court. *McCray* v. *Illinois*, 386 U.S. 300, 311 n. 11; *Roviaro* v. *United States*, 353 U.S. 53, 61. The trial court here specifically reserved ruling on the request to produce the informant until after the *in camera* examination of Detective Martinez, whose affidavit supported the warrant. At that examination the judge, the reporter and the witness were present (Mot. Tr. 226-227).[7] As a result

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[6] On November 17, 1975, the district court, in a written opinion and order, denied petitioners' motion for a new trial alleging newly discovered evidence. We are lodging a copy of that opinion with the Clerk.

[7] In examining Detective Martinez, in chambers before a reporter but without counsel present, the district court followed the procedure contained in the proposed Federal Rules of Evidence which this Court submitted to Congress. Proposed Rule 510(c)(3) (see 56 F.R.D. 183, 255-256). The rule, as

of the hearing, the court found that the informant, whose whereabouts were then unknown,[8] did exist but it did not order that he appear in court.[9]

The claim that the court should have allowed defense counsel to participate in the *in camera* hearing is not well taken. The court had a simple factual question to resolve: whether there was an informant as stated in the affidavit. In these circumstances, the court's decision to protect the identity of the informant by excluding counsel from the hearing was a proper exercise of its discretion, as the cases cited by petitioner (Pet. 7-8) hold. *United States* v. *Anderson*, 509 F.2d 724, 729-730 (C.A. 9), certiorari denied, 420 U.S. 910; *United States* v. *Hurse*, 477 F.2d 31, 33 (C.A. 8) (affirming after remand, 453 F.2d 128), certiorari denied, 414 U.S. 908.

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well as the other proposed rules regarding privilege, were not adopted by Congress, which opted instead for a rule which would permit the courts to fashion a federal common law on the subject. See 2 Weinstein's *Evidence* 501-1 to 501-5, 510-50 to 510-67 (1975). The procedure followed by the district court also conforms to that prescribed by *A Model Code of Pre-Arraignment Procedure*, Section SS 290.4 (1975), which the American Law Institute recently adopted.

[8] The district court could have excused the government from producing him for that reason. Cf. *Little* v. *United States*, 490 F.2d 686, 686-687 (C.A. 8).

[9] The district court gave careful consideration to petitioners' polygraph evidence (Mot. Tr. 227-228). However, the polygraph operator admitted that the validity of the results was limited by the overly specific form of the questions asked (Mot. Tr. 201).

United States v. *Hurse*, *supra*, does not conflict with the instant case, since the court there only held that production of the informant for a suppression hearing was required on the particular facts of that case. 453 F.2d at 130-131. There the police made a warrantless entry for an arrest and search, probable cause for which was based solely upon information supplied by an informant. In the instant case, the facts were significantly different: Detective Martinez obtained a warrant, and the informant's information was corroborated by the detective's personal observations (Pet. App. A-4 to A-5). The other cases relied on by petitioners (Pet. 7-8) are inapposite because they involved situations in which an informant's testimony would have related to the defendants' guilt or innocence, rather than probable cause for a search.

2. Petitioners contend (Pet. 11-14) that Wunnicke's incriminating statement at the Denver jail to a DEA agent should have been suppressed as a fruit of the allegedly illegal stop of Pieters' vehicle.[10]

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[10] Wunnicke's statement did not incriminate Pieters, but only himself. Hence, even if that statement should have been suppressed, it would not affect Pieters' conviction. Moreover, it is questionable whether Pieters would even have standing to move to suppress Wunnicke's statement. See *United States* v. *Guana-Sanchez*, 484 F.2d 590, 595-596 (C.A. 7) (Pell, J., dissenting), certiorari dismissed, 420 U.S. 513.

Wunnicke's statement was not the only evidence connecting him to the laboratory and the manufacture of MDA. Wunnicke examined the premises prior to the execution of the lease (Tr. 11-12), he was seen inside the laboratory by the landlord sometime later (Tr. 18), he met with a chemical salesman at

As the court of appeals held (Pet. App. A-4), the stop of Pieters' vehicle was reasonable under *Terry* v. *Ohio*, 392 U.S. 1, which permits an officer to stop and question individuals in an investigation in circumstances not justifying an arrest. *United States* v. *Harflinger*, 436 F.2d 928, 930, 932-933 (C.A. 8), certiorari denied, 402 U.S. 973. Cf. *United States* v. *Brignoni-Ponce*, No. 74-114, decided June 30, 1975, slip op. 8; *Adams* v. *Williams*, 407 U.S. 143, 146. The Boulder County detectives had been investigating petitioners for several months before they dropped out of sight, and had recent information that they were manufacturing drugs (Mot. Tr. 18).

This was simply a stop for a routine investigation; there is no evidence that the detectives intended to detain petitioners beyond the momentary requirements of their mission. Cf. *Rios* v. *United States*, 364 U.S. 253, 262, on remand, 192 F. Supp. 888 (S.D. Cal.). Nor is there any suggestion of arbitrariness or that the detectives intended to harass petitioners.[11] It was only after the lawful stop that Pieters volunteered the information that led to his and Wunnicke's arrest.

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the laboratory to discuss the possible purchase of chemicals (Tr. 80-83), and, when arrested, he was carrying keys for the doors of the laboratory (Ex. 28; Tr. 45-47, 49, 166).

[11] The cases cited by petitioners (Pet. 12-13) are inapposite. *United States* v. *Nicholas*, 448 F.2d 622, 624-625 (C.A. 8), involved an investigatory stop made by the police on the assumption that "any black person driving an auto with out-of-

But, even assuming *arguendo* that the stop of Pieters' vehicle was unlawful, Wunnicke's statement is not automatically inadmissible under *Brown* v. *Illinois*, No. 73-6650, decided June 26, 1975, as petitioners suggest (Pet. 14-15).[12] In *Brown*, this Court held that the question whether an incriminating statement made after an illegal arrest is purged of the illegality and therefore admissible, must be decided on the facts of each case. Among the factors to be considered are not only whether *Miranda* warnings were given before the statement was made, but also "[t]he temporal proximity of the arrest and the confession, the presence of intervening circumstances, * * * and, particularly, the purpose and flagrancy of the official misconduct." Slip op. 12 (footnotes and citation omitted). Under these criteria, the statement made by Wunnicke to the DEA agent was "suf-

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state license plates might be engaged in criminal activity." The court pointed out that the police were not investigating any particular crime and had no information regarding the occupants of the car; in the instant case the police did have information that the occupants of the car were committing a particular crime. *United States* v. *Ward*, 488 F.2d 162, 167-170 (C.A. 9) (*en banc*), involved a general investigatory stop by FBI agents, using their siren, of a person whose address and place of employment were known. Furthermore, the court found it significant that the agents were not investigating the person they stopped, but other persons. In addition, the court recognized the broader investigative powers of local police (such as those who stopped petitioners in the instant case) than of federal agents. *Id.* at 169.

[12] Since the court below held the stop of the vehicle lawful, it did not have to reach the question presented in *Brown*.

ficiently an act of free will to purge [any] primary taint." *Wong Sun* v. *United States*, 371 U.S. 471, 486.

Not only had *Miranda* warnings been given to petitioners by the local police, but the DEA agent who took the statement warned Wunnicke of his constitutional rights just before questioning him (Mot. Tr. 68-69). Moreover, Wunnicke himself testified that he understood his rights, and that no threat or coercion was used to induce the statement (Mot. Tr. 153-155). Wunnicke was being questioned not by the police who had made the stop, but by a federal DEA agent, who had just participated in the search of petitioners' laboratory, where a large amount of MDA had been found. The obvious impetus for the statement was Wunnicke's realization that the laboratory had been discovered. Accordingly, under all the circumstances, Wunnicke's statement was not a product of the stop of Pieters' vehicle. Cf. *Westover* v. *United States*, 384 U.S. 494, 496.[13]

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[13] Nor was it the product of an illegal detention of Wunnicke, as petitioners suggest (Pet. 14). Although Pieters claims he told the police that Wunnicke did not know about the pills, Pieters also told them he had not known of them either (Mot. Tr. 118, 138). Therefore, the possibility that Wunnicke had put the pills in the brief case without telling Pieters could not be discounted.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

SIDNEY M. GLAZER,
MARC PHILIP RICHMAN,
Attorneys.

DECEMBER 1975.

APPENDIX

ORAL OPINION OF THE HONORABLE ALFRED A. ARRAJ

(April 5, 1974)

(Transcript of Motion to Suppress Hearing, pages 232-233, 235-237; Volume VI of Record on Appeal)

* * * * *

[Mot. Tr. 232] Subsequent to our last hearing, as was referred to in court and suggested by I believe both counsel, the Court had an in camera interrogation of Detective Mike A. Martinez, who had signed the affidavit for the search warrant, and evidence was taken from him at that time. Those present were Mr. Martinez, the court reporter and myself. No other persons were present. That interrogation was made in my chambers.

Additionally, after the interrogation of the officer and as a result of his answers to certain questions which I propounded, I caused further investigation to be made by having the clerk of this court, not a deputy, but the clerk himself check certain records in the county court or the office of the clerk of the county court, City and County of Denver, and a memorandum of what he found as a result of my request was made by him and signed by him. Well, there are two memoranda, one referring to one of the incidents mentioned by Mr. Martinez in his affidavit and the other referring to a different incident [Mot. Tr. 233] mentioned by Mr. Martinez.

Now, the incidents themselves weren't mentioned, but he referred to previous occasions when he had obtained information from the informer and that memorandum or report by the clerk of this court was also typed and signed, and a transcript of the questions asked Mr. Martinez and his answers, certified by the court reporter, and those two memoranda that the clerk prepared as a result of his checking court records, county court records over at the City and County of Denver, will be sealed and made a part of the record in this case. They will not be available to counsel or to the public. They will only be available either by special order of this Court or in the event of an order by a higher court.

* * * * *

[Mot. Tr. 235] In making this ruling, I will tell you some more or I will tell you actually some of the things that I ascertained from my interrogation of the police officer, Mr. Martinez. I obtained the name of the informer. His present whereabouts I did not obtain. They were unknown to the police officer. I obtained the actual location of an edifice—I don't recall whether it was a residence or some other type of structure—where the police officer had been told by the informer that he would likely find illicit drugs, that that information was followed up and certain persons were arrested as a result of the information which the police obtained. The cases were prosecuted by the district attorney in the City and County of Denver, and a second incident that the

informant related to the police officer was [Mot. Tr. 236] also followed up and some persons were arrested, some material, allegedly illicit drugs, were obtained, and the matter turned over to the district attorney and cases filed by the district attorney, criminal cases.

As a result of that information, I concluded that Mr. Martinez had reasonable cause to believe the informant, because he had proven reliable in two, at least two, other instances, both of which were verified by the Court through its clerk checking the records and the documentary material that I earlier referred to.

So, I find that the affiant had probable cause to execute the affidavit and there was probable cause shown in the affidavit to support the search warrant which was eventually issued by Judge Mueller and was executed.

I also find that there was no illegal entry into 1220 South Jason Street, that on the date in qusetion, namely, January 16, 1974, the front door was unlocked by the testimony of the defendants themselves in this court, that this was not the home of the defendants. They did not live there. It was a building in which some enterprise was being engaged in by the defendants, but it had some sort of advertising signs I believe with the words Solar Metallurgicals on it, that the public were invited to go into this building because the front door was open. It was unlocked. In no sense was it a private dwelling or

private residence or private business even, and the motion to quash the [Mot. Tr. 237] evidence or to suppress the evidence obtained through the execution of the search warrant is denied.

Now, as to the material which I told you I had a transcript of, the in camera interrogation, and the other two documents, they will be sealed, but they will not be in the court file. They will be in the clerk's vault, the clerk of our court's vault.

* * * * *

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In The

Supreme Court of the United States

October Term, 1975

No. 75-406

KURT J. WUNNICKE, and EDWARD J. PIETERS,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR REHEARING

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In The

Supreme Court of the United States

October Term, 1975

No. 75-406

KURT J. WUNNICKE, and EDWARD J. PIETERS,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR REHEARING

Petitioners Kurt J. Wunnicke and Edward J. Pieters respectfully move this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on December 15, 1975, and (2) granting the petition. As grounds for this motion, Petitioners state the following:

1. Holding an in camera hearing without questioning the government's informer does not adequately protect a defendant's rights to a fair hearing and freedom from police misconduct.

The "Brief in Opposition" filed by the government may have clouded the issues presented, particularly in its statement, at pp. 2, 7-9, that Petitioners were urging that the informant be produced for examination by defense counsel at the suppression hearing. This has never been the crux of Petitioners' argument—not in this Court or below. Petitioners have never questioned the propriety of the holding of an *in camera* hearing by the trial court, and they have never asked that the informant be produced in open court. At all stages of this case, counsel have indicated their willingness to be bound by an order not to divulge to Petitioners or anyone else any information that might be revealed in an *in camera* hearing. Furthermore, while it is true that Petitioners did suggest that it might better aid the truth-finding process to allow counsel to cross-examine the informant (Pet. 8-10), the main point of Petitioners' argument has been that the trial *court* should have examined the informant *in camera*. The trial court indicated that it was concerned with the presentation of Petitioners, including their polygraph examinations, all of which raised the serious question of whether the informant existed, and if he did, whether he gained entry to Petitioners' laboratory by illegal means:

> At this point, there is only one thing I am concerned about, and that is whether or not the informant actually exists, and I think that—I am not sure what I can do unilaterally or in camera, ex parte, so

> to speak. I am willing to make a further investigation, find out or request the government to produce this man to me, but that doesn't give you the opportunity to face him, but the only reason I am doing that—I don't think I have to do that—but I do think you have done your homework, you gentlemen for the defense, and I think you have raised a question in my mind as to whether or not there actually was an informant in this case, and if so, was the information which he provided Martinez, I don't remember his title, but Officer Martinez, was that the basis for his saying he had probable cause to make the affidavit in connection with the search and for the eventual issuing of the warrant by the county judge, so possibly you can help me a little on what procedure the Court might follow so that the informant will have the protection that the law intends to give him and the defendants will have the protection that the law affords them. (Record on Appeal, vol. IV, pp. 208-209.)

Despite this stated concern about the existence of the informant, the district court proceeded to hold an *in camera* hearing at which he only examined the affiant police officer, Detective Martinez. Petitioners have argued that, at the least, the only manner in which a court could learn whether an informant actually exists is to personally examine the alleged informant. The procedure that was instead followed below cannot possibly aid the truth-finding process, for if the affiant was not telling the truth in the first instance, he could easily maintain that position in the *in camera* hearing. And, assuming *arguendo* that the informer did exist, then an examination of only the affiant would not resolve the question of his reckless handling of information possibly supplied him by the informant.

The Court of Appeals for the Sixth Circuit has recognized the implications of this problem, again in a case involving allegedly false representations in an affidavit:

> [I]t must be recognized that law enforcement agents presenting evidence to magistrates could make a mockery of the magistrate's role if, in the necessarily ex parte proceeding, they could freely employ false allegations in order to secure the warrant. The same could likewise be true if the agents could, with impunity, draft affidavits with utter recklessness as to truth or falsity. In either instance there would be a lack of good faith in the performance of the agent's duty to the judicial officer. *United States v. Luna*, — F. 2d — (No. 75-1084, CA 6 1975) (slip opinion at p. 7).

Where, as here, the trial court has been presented with more than a bare allegation that the information in the affidavit is false, and where the court itself indicates that it feels that investigation beyond the four corners of the affidavit is merited, the key question is how that investigation should be conducted and what witnesses should be examined. Petitioners suggest that in such a circumstance the trial court should be given discretion to hold an *in camera* hearing, but that the crucial witnesses, i. e., those with knowledge bearing on the alleged falsity, should be required to be present and be examined by the court. Virtually every court of appeals that has been presented with this question has recognized that the trial court should have discretion as to whether to exclude counsel and/or the defendants from the hearing, but every decision has also recognized that the informant should be present and be questioned.

In *United States v. Anderson,* 509 F. 2d 724 (CA 9 1975), cert. denied 420 U. S. 910 (1975), the court approved an *in camera* procedure that followed Proposed Rules of Evidence, Rule 510(c)(3) (56 F. R. D. 183, 255-256). Both the defendant and defense counsel were there excluded from the hearing, but the court did examine the government's witnesses. The Ninth Circuit approved a flexible procedure which gave the trial court discretion, but only a discretion which extended to the inclusion or exclusion of the defendant and counsel. There was no sanctioning of a failure to examine the alleged informant. In *United States v. Moore,* 522 F. 2d 1068 (CA 9 1975), cert. pending, No. 75-464, the district court conducted an *in camera* hearing in which FBI agents and the government's informer were questioned without the presence of counsel or the defendant. In approving this procedure, the Ninth Circuit said:

> In recent cases, our court has approved such *in camera* interviews for the purposes of determining whether law enforcement officers have justifiably trusted the conclusions drawn by an informer whose reliability has otherwise been established, *United States v. Anderson,* (citations omitted). * * * The *in camera* procedure provides an equally acceptable accommodation of the competing interests of the Government and the accused in the situation presented here, wherein the question is whether a law enforcement officer has lied. Through disclosure of the informer's identity to the trial judge, and such subsequent inquiries by the judge as may be necessary, the Government can be protected from any significant, unnecessary impairment of necessary secrecy, yet the defendant can be saved from what could be serious police misconduct. (Footnote omitted.) *Id.* at 1072-1073.

This is precisely the issue presented by this case, namely, how to best reconcile the competing interests presented and protect both the government's interest in secrecy and the defendant's interest in fairness and freedom from police falsehoods. While the government's interest in the protection of its informant can be most adequately preserved by the procedure of an *in camera* hearing, the defendant's rights cannot be preserved except by examination of the informant, at the very least by the trial judge.[1] Unless this Court determines, either as a matter of Constitutional doctrine or pursuant to this Court's supervisory powers, that a trial court conducting an *in camera* hearing in such circumstances must make inquiry of the alleged informant, the specter of police misconduct and misrepresentation that is raised by *United States v. Luna, supra,* cannot be dispelled. The remedy cries out in its simplicity, and yet it was ignored below. Other courts have recognized its merit, see, e. g., *United States v. Hurse,* 453 F. 2d 128, 131 (CA 8 1972), appeal after remand, 477 F. 2d 31, cert. denied 414 U. S. 908; *United States v. Jackson,* 384 F. 2d 825 (CA 3 1967), cert. denied 392 U. S. 932; *United States v. Winters,* 420 F. 2d 523, 524 (CA 3 1970); *McLawhorn v. North Carolina,* 484 F. 2d 1, 5 n. 12 (CA 4 1973). In order to resolve the conflict between the decision below and those of other circuits, and in order to adequately balance the rights of defendants against those of the government, this Court should grant the writ to review the decision below.

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1 While Petitioners still maintain that the truthfinding process would be better served by allowing counsel to participate in the **in camera** hearing under restrictions as to the divulgence of information their primary concern is that the trial court conduct a hearing that would adequately preserve their rights.

CONCLUSION

For the reasons stated above, as well as those contained in the Petition for Writ of Certiorari, Petitioners pray that this Court g r a n t rehearing of the order of denial, vacate that order, grant the Petition and review the judgment and opinion below.

Respectfully submitted,

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January, 1976

CERTIFICATE OF COUNSEL

As counsel for Petitioners, I hereby certify that this Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

Louis M. Fischer